

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CRIMINAL DIVISION) HCT-00-CR-SC-0970-2016

UGANDA.....PROSECUTOR

VERSUS

KAMYUKA IVAN.....ACCUSED

BEFORE: HON. JUSTICE J. W. KWESIGA JUDGMENT

The Accused person is indicted under Sections 188 and 189 of the Penal Code Act with Murder.

It is stated that Kamyuka Ivan on 2nd August 2015 at Guvnor Night Club, 1st street, Industrial area, Kampala district, with malice aforethought unlawfully killed Ahimbisibwe John.

The Accused person pleaded not guilty. The Accused person who pleads not guilty enjoys presumption of innocence as guaranteed by Article 28 (3)(a) of the Constitution of Uganda. It states that every person charged with any Criminal offence is presumed innocent until he pleads guilty or is proved guilty. So, by who and how is he proved guilty?

In Woolington Versus DPP (1935) AC 462 Lord Sankey LC (As he then was) settled it as follows 'When dealing with a Murder case, the crown (state)

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must prove death as a result of a voluntary act of the accused and malice aforethought of the Accused When evidence of death and malice has been given, the accused person by evidence is entitled to show that death was un-intentional or was provoked or was in self-defence"

The correct position in Uganda was set out by *Justice Ongom L.* (As he then was) in *Uganda Versus Dick Ojok (1992-1993) HCB*

54 he held:- In all Criminal Cases, the duty of proving the guilt of the accused always lies on the prosecution and that duty does not shift to the accused except in a few statutory cases and the standard of proof is beyond reasonable doubt. In a charge of Murder, the prosecution must prove all ingredients beyond reasonable doubt, that is to say;-

- (a) That the victim is dead.
- (b) That the death was due to unlawful act or omission.
- (c) That the unlawful act or omission causing death was caused with malice aforethought or with knowledge that the act or omission would probably cause death or grievous harm.
- (d) That the Accused person is responsible for the act or omission.

Also in reference on the elements of the offence of Murder, See:-

■ **Uganda Versus Bosco Okello (1992-93) HCB 68.**

■ **Uganda Versus Fibo Alex - Criminal Session Case 98 of 2008 by Justice J.**

W. Kwesiga at Arua (Not reported).

The prosecution must adduce enough and credible evidence to prove the above elements of the offences beyond reasonable doubt.

Proof of death:

PW2, Dr. William Male Mutumba a Consultant Pathologist examined the body of Ahimbisibwe John on 2nd August 2015. The Report admitted as PE.3(a) and (b) in summary established the body had a deep cut would on the neck. The artery was cut and due to excessive bleeding, the victim died. This was the artery that carried blood from the heart, therefore, the injury was fatal.

PW3, Charity Kyomuhendo told court that she was a sister of the deceased and saw John Ahimbisibwe dead on 2nd August 2015 at Case Clinic, Kampala.

She identified the body of Ahimbisibwe to PW2 for postmortem examination and she subsequently attended the victim's burial. I am satisfied that the evidence of PW2 and PW3 proved beyond reasonable doubt the fact of death of John Ahimbisibwe and that it occurred on 2nd August 2015.

Whether death was unlawfully caused or not?

On the fateful night, 2nd August 2015, the deceased was well and alive until he got into a fight with the Accused.

PW4, Sam Ssali watched from less than 5 metres where the Accused hit the deceased.

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He saw the deceased bleeding from the neck, he saw him loose balance and falling down. The Accused and a lady companion were arrested by the Bouncers who led them to the toilets. PW4 did not see who started the fight. By the time he turned to see, he found the deceased trying to attack but lost balance and collapsed on the ground.

PW4 tried to stand in the middle, between the Accused and deceased to prevent further fighting.

PW5, Robert Omona came to the scene when the deceased was on the ground lying in a pool of blood. He had been injured on the neck. He was rushed to Case Clinic, but was declared dead.

The Postmortem Report plus the deceased's photographs, (Prosecution Exhibits) clearly show that the deceased did not die of a natural death. He died as a result of an assault with a sharp object on the neck. The above evidence proved that this was a homicide and therefore, unlawful. It is a settled legal position that killing of a human being is unlawful unless it is proved to have been caused in self-defence or accidentally.

In the instant case, the Accused conceded in his defence that he was at the scene of crime. That the deceased attacked him in the Night Club. Shortly after, he saw the deceased smash a glass in the face of his wife and he moved in and pushed the deceased to prevent further attacks on the wife. The deceased continued to attack. His wife sustained cuts on the face, lips, eyes and two teeth were shaking. She was bleeding from the nose. That he acted purely in defence of his wife.

He followed her to the toilets to help her and they were locked in the toilet until security persons got them out. That he did all he did in defence of his wife. He did not use or lose his watch and he had no glass in his hands. Only the deceased had a glass, he used to hit the Accused's wife.

DW2, Nima Nyarwaka, wife of Accused. While in the dancing club well 1:00 a.m, the Accused wanted to go to the toilets. The deceased attacked the Accused. She asked why he was attacking her husband, "***John had a glass in his hands, he smashed it into my face, he injured me. I could not see. I screamed a lot, my husband (Accused) came to prevent him. I ran to the toilet to dean up my face***".

See: PE.2 She revealed that she had a relationship with the deceased before marriage and they separated because he was a violent man. They had a seven (7) years old son. He was deported from Sweden due to his violence against her.

In Uganda Versus Kato T1976) HCB 214, Ssekandi Ag, j. (as he then was) clearly set out the duty of a trial Judge in a situation at hand. He held that;- "It is the duty of the court as far as possible to examine all the surrounding circumstances of the case including the actions of the Accused, the conduct which preceds and very often the conduct which follows the killing, in particular, the way the killing was carried out, the nature, the number, the quality of injuries, the nature and the kind of weapon that was used and then ask itself whether it is satisfied that at the time of the killing there must have been an intention to kill. If the court is satisfied that the intention exists, then the Accused would be convicted of Murder".

I have found the above holding very instructive guideline with which to approach this case. The defence in the case before me contends that the death of John Ahimbisibwe on 2nd August 2015 was a result of a fight he provoked and that the Accused person acted in defence of his wife.

DW2 evidence is that she got married to the Accused person in 2013. Exhibit DE.4 is their marriage Certificate dated 13th December 2013. I am satisfied that DW2 is a wife of DW1/Accused person.

The Law on self-defence contains four ingredients:-

- (a) There must be an attack on the Accused person or a close relative.
- (b) The Accused must, as a result have reasonably believed that he was in imminent danger of death or serious bodily harm.
- (c) The Accused must have believed it necessary to use force to repel the attack.
- (d) The force used by the Accused must be such force as the Accused believed on reasonable grounds to have been necessary to prevent or resist the attack. In determining whether the extent of the force used by Accused was reasonably necessary, regard must be had to all the circumstances of the case. The legal position settled is that a person attacked in such circumstances did reasonably believes his life to be in imminent danger is entitled to use force even deadly force, to repel the attack depending on the

_____ versus r. (1959[^] EA 660 held:- "It must be a question of fact in each case whether the degree of force used in defence of property which caused death was, in the particular circumstances of the case, justifiable or, if not justifiable whether it was such as to amount only to manslaughter or was so excessive to constitute the offence of Murder".

Finally, on self-defence I have the most appropriate definition in Black's Law Dictionary, 9th Edition at Page 1481:- That it is "The use of force to protect oneself, one's family or one's property from a real or threatened attack: Generally a person is justified in using a reasonable amount of force in self-defence, if he or she reasonably believes that the danger of bodily harm is imminent and that force is necessary to avoid this danger".

Following the above authorities, I hold that it is a right and a duty of any spouse to use force to prevail over an Attacker or to repel an Attack or using reasonable force even if it may lead to death of the Attacker. There is no doubt that the deceased Person attacked the Accused person and that the Accused's wife had been injured and that the deceased had attacked and injured the

wife and she was bleeding.

This fact of danger to the accused person's wife was proved by both the prosecution and defence evidence and specific proof is prosecution Exhibit PEX.2, a Medical Report dated 3rd August 2015. Sgt. Opio noted that she had wounds on the forehead, lips and 2 teeth were shaking. She had a black right eye.

Dr. Ojara who examined her confirmed these injuries. These were actual bodily injuries inflicted by a great deal of force used by her Attacker. The un-challenged defence evidence is that the injuries were done by the deceased and he was still near her and was in a combative action.

The prosecution contended that the Accused was the first attacker and that therefore, self-defence was not available to the Accused. Reference was made to a decision by the *Court of Appeal* in *Kiiza Mohammad Versus Uganda - Criminal Appeal No. 0101 of 2008 (CAIO)*. The Justices of the Court of Appeal held that where the Appellant was the Attacker who first insulted the deceased, the defence of self-defence was not available to the Appellant.

In the instant case, the only evidence available as who attacked who first is as set out below :-

- (a) *PW4, Sam Ssali was at the scene. He saw the deceased already bleeding, charging at the Accused but lost balance and fell down. "The blood was gashing out, his oponent was standing at the entrance — the opponent was standing looking on. The opponent tried to pass to go, I pushed him back, he entered the toilet, I held the door. — I saw him closely, it was the Accused now".*

Under Cross-Examination he stated:-

- He was standing 5 metres from where the fight was.
- He did not see the Accused punching the deceased.
- He did not observe anything on the woman.
- He could not tell how the fight started.
- By the time he turned to see, the deceased was trying to attack.

Accused (DW1) testified that while he was talking to one Nsubuga, the deceased pushed him. He was prevailed over by Nsubuga and another. Deceased instead moved and smashed a glass on the face of Accused's wife. Deceased attacked first.

DW2, Nima that deceased attacked first. He abused her as a **bitch** and **prostitute**. He smashed a glass on her face. She was injured.

I have not found any other evidence that would prove beyond reasonable doubt that it is not the deceased who attacked DW2 and DW1 to start the fight.

The burden of proof is upon the prosecution to adduce evidence that proves absence of self-defence. In Oloo S/o Gai Versus R. (1969) EA 86 EACA adopted the holding in Chan Kau Versus R. (1955) 2 WLR 192 on the burden of proof of self defence:- "—In cases where the evidence discloses a possible defence of self-defence, the onus remains upon the prosecution to establish that the Accused is guilty of the crime of Murder and the onus never shifts to the Accused person to establish this defence anymore than it is for him to establish provocation or any other defence apart from that of insanity".

Considering the fact that the confrontation and engagement in a fight between the Accused and the deceased was after the Accused person's wife had been assaulted and injured by the deceased who remained at the scene of crime in combative action proves that the deceased was the attacker.

Secondly, the type of injuries, visible wounds and bleeding on the face of DW2 Nima were sufficient proof of actual harm and apprehension that further attack could cause similar or worst injuries.

In my view, this justified use of force to prevent occurrence. The Accused was entitled to defend his wife and I find that self-defence, as a defence as available to him.

Justice L. Ongom (as he then was) In Uganda Versus Dick Oiook (1992-1993) HCB 54 at 55 held:- "It is trite Law that a person attacked in such circumstances that he reasonably believes his life to be in imminent danger is entitled to use force, even deadly force, to repel the attack and the decision whether the Accused is placed in such situation as necessitates the use of force to protect his life is one of fact and depends on the circumstances of each case"

In the circumstances of this particular case, I have found, a part from self- defence, there were circumstances that amounted to provocation;-

- (a) The Deceased abused the Accused person's wife as a *prostitute* and a *bitch*.
- (b) The deceased violently pushed the Accused person.
- (c) The deceased violently assaulted the Accused person's wife injuring her on the face and teeth.

The combination of the above amount to provocation that negative malice aforethought.

Section 192 of the Penal Code Act deals with killing on provocation and it states:- "When a person who unlawfully kills another under circumstances which > but for this section would constitute Murder, does the act, which causes death in the heat of passion caused by sudden provocation as defined in Section 193, and before there is time for his or her passion to cool, he or she commits manslaughter only".

The Supreme Court in Qbote William Versus Uganda - Criminal

Application 12 of 2014 settled the requirements for provocation to reduce Murder to Manslaughter:-

1. The death must have been caused in the heat of passion before there is time to cool.
2. The provocation must be sudden.
3. The provocation must be caused by a wrongful act or insult.
4. The wrongful act or insult must be of such a nature as would be likely to deprive an ordinary person of the class to which the Accused belongs of power of self control.

5. The provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered.

Both provocation and self-defence are available in the instant case and the final effect of these defences is that the allegation of malice aforethought has been successfully rebutted.

The Supreme Court of Uganda in Gabriel Bvabaqambi Versus Uganda

- *Criminal Appeal No. 16 of 2002 held, and I quote:- "Normally a successful defence of self-defence in homicide cases would lead to acquittal of an Accused However, because of the two injuries inflicted on the deceased as revealed in this case by the post mortem report, we think that the force used by the Appellant (Accused) was excessive but not so excessive as to remove the defence of self-defence from the Appellant".*

Where the force used at the time of killing the deceased is disproportionate to the mischief or fear or danger he is trying to avoid, a conviction of manslaughter is appropriate.

Testing appropriateness of the force used depends on the circumstances of each case. For instance there is need to weigh the force used to the threat that was at hand. In the instant case the deceased was not armed at the time the Accused engaged him in a fight. The assault of the Accused's wife was already complete and the Accused did not assault the deceased to disengage him. But I have considered that the deadly tool the deceased had was that with which he had injured the Accused person's wife and it had smashed and there was no danger of being similarly used against the Accused person or his wife.

I have considered the fact that no weapon or tool or object was recovered as that used by the Accused to injure the deceased with one fatal blow. No witness saw it and no speculation can be allowed to suggest the weapon used.

In my view, determining use of excessive force can be done through evaluation of the evidence surrounding cause of death as contained in the Post Mortem Report and testimony of the medical

Officer who examined the dead body.

PW1, Dr. Ojara Santos told court that he examined the accused person under Police Form 24, admitted as Prosecution Exhibit P.1. He had a small cut wound on the right hand arm. Nima (See P.2) had skin injuries not deep and associated with use of a blunt object.

The description of injuries caused by a blunt object in my view rebuts the defence evidence that she was injured by a smashed/broken glass. In my assessment, broken glass would most likely cause a deep cut wound which is not the case. Exhibit PE.3 Postmortem Report, the Doctor observed The deceased suffered

- (i) Abrasion on the left side of the face, 4.0 cm.
- (ii) Penetrating stab wound just below the angle of the mandible on left upper neck.
- (iii) Wound 2.5 x 20 cm on lower edge.
- (iv) The left carotid entry was partly severed at the angle of the mandible. ***The penetrating neck injury was the cause of death.***

Dr. Mutumba (PW2) stated he made the above post-mortem examination. The deep penetrating wound had cut the ARTERY. The most vulnerable part of the neck. That it must have been caused by a sharp implement like a knife or razor blade.

In my view, it is immaterial that the implement used was not recovered. It is also immaterial that Police failed to conclusively carry out forensic examination of the items recovered from the scene of crime such as a metallic watch or broken glass. This omission only led to a failure to prove that these were the killer weapons. However, this does not devalue Doctor Mutumba's evidence that a sharp implement was used or was the only thing that would lead to this penetrating deep wound.

He rebutted the suggestion that this was a mere blow to blow fight. I find that there was excessive force. The surrounding circumstances proved that the incident took place in a crowded dancing

hall. The Accused did not use the option of Mediators, Security Staff to arrest the deceased to repel the attacker.

In final analysis, this is a typical case where a finding of self-defence in favour of the Accused person combined with a finding of provocation as I have done would entitle the Accused person to acquittal. He is absolved of killing with malice aforethought and found guilty of manslaughter Contrary to Section 187 and 190 of the Penal Code and convict.

I did consider the opinion of the Assessors and I have not been able to follow their advice because they dis-regarded the effect of use of excessive force in self defence.

Dated this **14th** day of **June 2018**.

J.W. Kwesiga
HIGH COURT JUDGE

14/06/2018

In the presence of:-

- > Accused
- > Mr. Julius Galisonga for Accused
- > Miss Ninsima holding brief for State Attorney

SENTENCING:

Prosecution; We are ready to submit on;-

1. No previous criminal record.
2. He was remanded from 2/8/2015 to 28/10/2016, these are 15 months.

Mr. Julius Galisonga:

- I adopt the earlier submissions. I pray that you consider the mitigating factors in the case.
- Sentence to a lenient punishment. Use discretion, sentence him to what he has already served and set him free.

Mr. Kamyuka Ivan (Accused): I ask for forgiveness, this was accidental and sudden. I apologized. I still apologize. That is all.

SENTENCE AND REASONS FOR IT:

I have listened to the state submissions that the convict is a first offender who spent on remand 15 months before he was granted bail. He is a young man with chances of reforming and being responsible. I have considered the defence submissions and plea for lenience. This is a case where life was lost in circumstances where the victim/deceased has been found to have partly contributed to causes of his fatal injuries.

This was not the first time that he committed violence against the Accused person's wife. The only blame that the Accused person is being punished for is use of excessive force while acting in self-defence and under provocations.

Weighing the above mitigating circumstances, I find that he deserves a lighter sentence than 15 years proposed by the state. I do sentence the convict to a period long enough to reform and short enough to return and be a useful citizen.

I sentence the convict to Five (5) years imprisonment, less 13/12 he spend on remand. The convict is free to appeal against the decision.

Dated this **14th** day of **June 2018**.

J.W. Kwesiga
HIGH COURT JUDGE

14/06/2018